NO. 4504.

In The

United States Circuit Court of Appeals

For the Ninth Circuit

BOOTH FISHERIES COMPANY,
a corporation,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Division Number One.

Brief for Defendant in Error

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STATEMENT.

On December 10, 1924, Booth Fisheries Company was found guilty by a jury of two separate violations of the fisheries laws. Conviction in Case No. 1749-B was for illegally fishing for and taking salmon for commercial purposes from July 26, 1924, until August 20, 1924, by means of a fish trap, within 500 yards of the mouth of Lucky Cove Creek, in violation of section 4 of the Act of Congress approved June 26, 1906, as amended by the Act of June 6, 1924, commonly known as the White Bill, being an Act of Congress for the protection and conservation

of the fisheries of Alaska. Conviction in case No. 1778-B was for illegally erecting and maintaining a fish trap, on July 25, 1924, within 500 yards of the mouth of Lucky Cove Creek, with the purpose and result of capturing salmon and preventing and impeding their ascent to the spawning grounds in said Creek, in violation of section 3 of the same Act of Congress. The two cases were consolidated and tried together.

Plaintiff in error sets up eight assignments of error. Assignments 3 and 4 are argued in the brief. The remaining six assignments are set up in the brief, but they are not argued.

The plan of this brief is to meet, first, assignments 3 and 4, and thereafter the six unargued assignments.

ARGUMENT.

ASSIGNMENTS 3 AND 4.

The principal objections urged, and the only points argued, are in Assignments 3 and 4.

Assignment 3 is as follows (p. 5 Brief; p. 172 Trans.):

> "The District Court erred in giving Instruction No. VII to the jury, which reads as follows:
>
> 'To this end, I charge you that the mouth of a stream emptying into tidewater, is the point or place where the waters of the stream meet tidewater at mean low tide. It is not where the waters of the stream meet tide water at high tide, but where the waters of the stream

meet tidewater at mean—that is, the average—low tide.' "

The point urged by plaintiff in error is (p. 8 Brief): "Was it error for the trial court to instruct the jury as in Instruction No. 7 which defined as a matter of law the mouth of a stream emptying into tidewater?"

In each of the actions it was necessary to fix the mouth of Lucky Cove Creek in order to determine whether the defendant had engaged in illegal fishing operations, or had maintained an unlawful obstruction, within 500 yards of the mouth of such creek.

There was considerable evidence to show, and there was a map (now on file here) offered in evidence to illustrate, the point or place where the fresh waters of Lucky Cove Creek met the salt waters of Lucky Cove. (Trans. pp. 32-67.) The determination of the point or place where the fresh waters of Lucky Cove Creek united with the salt waters of Lucky Cove at mean low tide, as a fact, was left to the jury by the court under the following instruction:

> " . . . The testimony herein shows that the Secretary of Commerce had not fixed the mouth of the creek nor marked it, in which event it becomes a question of fact as to where the mouth of the creek is, to be determined by the jury in each particular case from the evidence and from the instructions given them by the court. . ." Instruction 11 (p. 143 Trans.)

Did the court correctly define to the jury the point or place they were to locate and determine as a fact? In other words: Did the court correctly state the law in the instruction that the mouth of a stream emptying into salt water is the point or place where the waters of the stream meet tide waters at mean low tide?

We assert now that the instruction was a correct statement of the law. We are confronted with the fact that the phrase "mouth of a stream" has never been judicially construed by this court, as far as we have been able to determine. Indeed, in very few instances has the phrase ever been judicially defined. We have patiently and exhaustively searched through the reports and decisions in an effort to assist this court in arriving at a correct construction and interpretation of the words "mouth of a stream" as used in sections 3 and 4 of the White Bill. We hope the following will convince the court, as we are convinced, that the instruction correctly stated the law of the case.

At first glance, the mouth of a stream might be at any one of four places: (1) at low tide; (2) at high tide line on the sea beach; (3) at any point between low and high tide, the mouth shifting on the beach with the tide; and (4) above high tide line, the mouth shifting with the rise and fall of the tidal waters.

It is apparent that some definite fixed point or

place must be determined as the mouth of such a stream as is referred to in sections 3 and 4 of the White Bill.

Many salmon streams in Alaska are similar to Lucky Cove Creek, that is, many of such streams at low tide flow over flats below high tide line of the sea shore, through well defined channels, confined by banks on each side, for a considerable distance before the fresh waters of the stream unite with the salt waters of the sea.

Now, if we should assume that the mouth of a stream is at high tide line, or above high tide line, on the sea shore, we would be confronted with this incongruity: In any salmon stream flowing over tide flats for a distance greater than 500 yards from high tide line on the sea shore, such stream would be absolutely unprotected between high and low tide lines, excepting for 500 yards below high tide line.

This situation could not arise if the mouth of a stream is at the lowest point on a stream, that is, where the waters of the stream unite with salt waters at low tide, because it is unlawful to fish for, take, or kill salmon **in a stream**; or to fish for, take, or kill, or obstruct salmon within 500 yards of the mouth of a stream. (Sections 3 and 4 ante.)

Again, if the mouth of a stream fluctuates with the tide according to our illustration (3), and moves up and down the beach with the tide as fresh waters unite with salt waters, then a fixed fishing appli-

ance might be in the incongruous position of fishing for, taking or obstructing salmon lawfully at one stage of the tide, and unlawfully at another stage of the tide.

We submit that it was not the intention of Congress to leave any portion of a stream, or within 500 yards of its mouth, unprotected at any stage of the tide. Sections 3 and 4 of the White Bill fully protect any and all salmon streams in Alaska at all stages of the tide, if the mouth of a stream is where fresh water meets or unites with salt water at mean low tide.

Therefore, we submit that Congress intended the words "mouth of a creek, stream, or river" to mean that point in a creek, stream, or river where fresh waters meet or unite with salt waters at mean low tide. We further submit that in so defining the mouth of a creek, stream, or river the court correctly stated the law of the case.

In our extensive examination of reports and authorities in an effort to assist this court in arriving at a correct interpretation of the phrase "mouth of a stream," we have not discovered a single case which even intimates that the mouth of a stream, for such purposes as are expressed in sections 3 and 4, is at any other point or place than as defined by Instruction seven in these cases. On the contrary, all of the cases and authorities we have been able to find clearly show that a point at low water is intended.

Section 5187 Rem. & Ball. Ann. Codes and Statutes of Washington provides:

> " . . . It shall be unlawful at any time to take fish * * in Chambers Creek in the County of Pierce, or within two hundred and fifty yards of the mouth of said Creek, and the mouth of said creek shall be construed to mean the junction were the fresh and salt waters meet at low tide. . . ."

It is apparent that the Legislature of Washington intended to fully protect the fish in Chambers Creek to the lowest possible point on the creek, and at all stages of the tide.

Rev. Stat. Ariz. 1901, Par. 931, provides:

> "The mouth of a creek or river, or the junction of a creek or river with a river, is the point where the middle of the channel of each intersects the other."

It is apparent that the statute defines the mouth as the lowest point on the stream.

Vol. 5, Words and Phrases Judicially Defined, page 4614, says:

> "The mouth of a creek, river or slough which empties into another creek, river or slough is the point where the middle of the channels intersect. Pol. Code Cal. 1903, Section 3908."

Again it is apparent that the mouth of a stream is the farthest point down the stream from the source.

Farnham on Waters and Water Rights, Vol. 2, page 1643:

> "The mouth of a stream emptying into a tidal river is where it flows into it when the tide

> permits it to flow and is the same at high water as at low water."

It is clear that a point at low tide is intended as the mouth of a stream.

In the case of Minnesota v. Wisconsin, 252 U. S. 273, 40 Sup. Ct. 313, a boundary dispute arose between the two states and it became necessary to interpret the meaning of the words "to the mouth of the St. Louis River." The court says:

> "The complainant maintains that within the true intendment of the statute the 'mouth of the St. Louis River' is southeast of Big Island, where end the banks, channel and current characteristic of a river, and lake features begin. On the other hand the defendant insists, and we think correctly, that such mouth is at the junction of Lake Superior and the deep channel between Minnesota and Wisconsin points—'The Entry'."

Again, the very furthermost point downward in the river is the mouth.

In an early Pennsylvania case, Ball v. Slack, 30 Am. Dec. 278, the Supreme Court of Pennsylvania decided as a matter of law what was the mouth of Gunner's Creek, a small stream emptying into the Delaware River at a point where the river was affected by tide waters. The tide went up Gunner's Creek a mile or more. The court said:

> "The mouth of Gunner's Creek must mean the place where it discharges its water into the Delaware; if it meant the point beyond which the tide did not stop its current, or swell beyond its banks, then the mouth was a mile from the spot

> in dispute; which is not pretended. * * * Gunner's Creek is where the water of that creek flows, when the tide permits it to flow; and the mouth of Gunner's Creek is where it flows into the Delaware, when the tide permits it to flow; and is the same at high water as at low water."

It is very evident the court meant that the mouth of Gunner's Creek was the lowest point on the creek where it flowed into the Delaware River when there was no tide in either the creek or the river, that is, at low tide.

Judge Jennings of the District Court for the First Division, District of Alaska, in 1914, in U. S. vs. Pure Food Fish Co. et. al., No. 1023-B, instructed the jury as to the mouth of a stream under these sections in the following language:

> "Now, as a matter of law, gentlemen, I am going to tell you the court's construction of the meaning of 'the mouth of a stream' as used in this statute. A stream of water, in the sense of the statute, is water flowing between well defined banks—perhaps I should not use the words 'well defined' for the reason that it might give you a wrong impression—it is water flowing between defined banks—banks that you can see—banks that are perceptible—flowing water confined within banks, as distinguished from water running hither and thither, nowhere and everywhere. If the water is flowing naturally, confined between banks, that is a stream of water in the sense of the statute.
>
> Now, in the case of a stream of water emptying into a bay of the sea, why, the mouth of that stream of water is the end of the stream of

> water at the ordinary low tide of the bay—where the stream joins on to the water of the bay at low tide, that is the mouth of the stream. It is not necessarily at that point where the water is salty, because salt water sometimes runs several miles up a stream; so that is not the criterion—where the salt water meets the fresh water, but it is where the stream as a stream fades away and dissolves—in other words, where the stream loses its identity as a stream with banks confining it, and, as it were, leaps into and becomes a part of the sea."

This construction of the statutes in question has been respected and followed by the courts in Alaska for more than ten years. Fish traps have been erected and maintained; fishing operations have been carried on; and Bureau of Fisheries officials have enforced the statutes in conformance with this construction, for a similar length of time. Furthermore, Congress, in 1924, amended the two sections and again used the phrase "mouth of a stream", presumptively in accordance with the foregoing interpretation. Any other interpretation of the statutes now would seriously affect fishing rights and privileges in this Territory.

> "A construction placed upon a statute by inferior courts and long acquisced in will generally be upheld, especially where the adoption of a different rule would cause great mischief." 36 Cyc. 1143.
>
> "The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest of-

ficers in the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous." 36 Cyc. 1140.

"Where a statute that has been construed by the courts has been reenacted in the same, or substantially the same, terms, the legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless it expressly provides for a different construction. So where words or phrases employed in a new statute have been construed by the courts to have been used in a particular sense in a previous statute on the same subject, or one analogous to it, they are presumed, in the absence of a clearly expressed intent to the contrary, to be used in the same sense in the new statute as in the previous statute." 36 Cyc. 1153 (B).

We respectfully contend that this court should affirm the long settled and followed interpretation of the term "mouth of a stream" as that point where fresh waters meet or unite with salt waters at mean low tide.

Assignment 4 is as follows (p. 5 Brief; p. 172 Trans.):

"The Court erred in giving Instruction No. XI to the jury, which is as follows:

'A further question is whether there were any markers on that creek. I charge you that this is not material as to either of these informtions. That clause in Section 3 reading, 'For the purposes of this Section, the mouth of such creek, stream or river shall be taken to be the point determined as such mouth by the Secre-

> tary of Commerce and marked in accordance with this determination', is only for the purpose of fixing the mouth of the creek when and as determined by the Secretary of Commerce. The testimony herein shows that the Secretary of Commerce had not fixed the mouth of the creek nor marked it, in which event it becomes a question of fact as to where the mouth of the creek is, to be determined by the jury in each particular case from the evidence and from the instructions given them by the court. If, however, the Secretary of Commerce should determine where the mouth of the creek is and should mark it, then the court would be bound by it; but, not having done so, the court is not bound by it."

The point urged by plaintiff in error is (p. 23 Brief):

> "Was it error for the court to instruct the jury, as in Instruction eleven, in which the court stated that it was not material whether markers were placed on the creek and the mouth determined and marked by the Secretary of Commerce?"

The pertinent provisions of section 3, referred to in Instruction eleven, are as follows:

> "That it shall be unlawful to erect or maintain (certain fishing appliances,including fish traps) within 500 yards of the mouth of any creek, stream, or river into which salmon run. * * * For the purposes of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination. * * *"

Section 4 contains no provisions for determining

and marking the mouth of a stream. The provision for determining and marking the mouth of a stream is pertinent only to section 3. The limiting words are: "For the purpose of this section" (Section 3). Therefore, if in this case there could be no violation of section 3 until the mouth of Lucky Cove Creek was determined and marked by the Secretary of Commerce, the provision cannot affect the conviction in Case No. 1749-B, for a violation of section 4.

Nor, we contend, does the failure to determine and mark the mouth of Lucky Cove Creek affect the conviction in Case No. 1778-B for a violation of section 3.

The violations charged in these cases occurred between July 25, 1924, and August 20, 1924. Section 3 of the White Bill, which contains the provision for determining and marking the "mouth of a stream" for the purposes of section 3, was approved June 6, 1924. Section 3 of the White Bill amended section 3 of the Act of Congress entitled "An Act for the protection and regulations of the fisheries of Alaska," approved June 26, 1906.

Section 3 of the Act of June 26, 1906, (Section 3630 U. S. Comp. Stat. 1916) is as follows:

> "It shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than five hundred feet, or within five hundred yards of the mouth of any

red-salmon stream where the same is less than five hundred feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce (and Labor) is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed."

It is apparent that there was no need to determine or mark the mouth of a stream under section 3 of the Act of June 26, 1906. It is not reasonable to assume that Congress in amending section 3 of the Act of June 26, 1906, by section 3 of the White Bill, intended to leave the amendment inoperative until the Secretary of Commerce, by the Bureau of Fisheries agents, determined and marked the mouths of the thousands of salmon streams in Alaska. It is not reasonable to assume that any stream theretofore protected by section 3 of the Act of 1906 came within the provisions of section 3 as amended by the Act of June 6, 1924, when, and only when, its mouth was determined and marked.

The amendment of section 3 was made for the further protection of salmon. In the amendment, to increase the protection to salmon, the dimensions of the waters protected are increased; the fish protected by the amendment are: all salmon, instead of only red salmon; and new limitations are imposed upon the use of seines and traps. Clearly, the intention was to impose immediate additional protection to the salmon fisheries of Alaska.

Therefore, we assume, Congress intended that section 3 as amended, when it became effective became immediately operative as a protective measure. It was not humanly possible for the Bureau of Fisheries to immediately determine and mark the mouths of all the creeks, streams, and rivers of Alaska in which salmon run. In the meantime, that is, until the mouths of such creeks, streams and rivers are determined and marked, we contend that under section 3, as amended, the mouth of a creek, stream, or river into which salmon run, emptying into salt water, is the point where fresh water meets salt water at mean low tide.

The crime defined in section 3 is obstructing a salmon stream within 500 yards of its mouth. It is not that of obstructing a salmon stream whose mouth has been determined and marked. Booth Fisheries Company was convicted of the crime of obstructing a salmon stream within 500 yards of its mouth, and, we submit, the Company is just as guilty of violating the provisions of section 3 as though the Secretary had determined and marked the mouth. To hold the contrary is just as unreasonable, in theory as in fact, as to assume that Lucky Cove Creek had no mouth because the mouth had not been determined and marked.

We believe that Congress intended, by the provisions of Section 3 for marking the mouths of streams, to afford the Bureau of Fisheries officials an opportunity to cover just such situations as coun-

sel describes at page 23 of his Brief.

When Bureau officials determine and mark a point as the mouth of a stream, the marker governs. When the mouth has not been determined and marked, it is a question of fact for the jury to determine the point or place where fresh waters of the stream meet salt water at mean low tide. This point or place is, as a matter of law, the mouth of the stream.

We conclude, therefore, that the court, by Instruction eleven, correctly stated the law of the case.

ARGUMENT.

ASSIGNMENTS 1, 2, 5, 6, 7, AND 8.

The plaintiff in error, Booth Fisheries Company, by the assignment of errors, sets up eight separate grounds of error. They are set up in the brief (pp. 4-9) in the exact words of the assignment of errors. Only two of the objections so assigned are argued in the brief, and, we conclude, therefore, that all of the assignments excepting numbers three and four are waived. The rule of law in such cases is set out in 17 C. J. (Criminal Law) 212, Section 3559, as follows:

> "As a general rule questions assigned as error by appellant are deemed to be abandoned or waived, where they are not urged in his brief or argument, and will not be reviewed, unless the error is a fundamental one, or is so patent that no argument is needed to demonstrate it."

Great Northern Railway Company v. U. S.
208 U. S. 452, 28 Sup.Ct. 313;
May v. U. S. (C C A 8) 236 Fed. 495;
Meyers v. Morgan (C C A 8) 224 Fed. 413.

And in 17 C. J. (Criminal Law) p. 189, Section 3498:

> "Courts are entitled always to a conscientious and earnest effort on the part of counsel to aid them in the decision of cases, and the rule is well settled that, in addition to specifying the alleged error complained of, the brief should state reasons to show why the rulings complained of are erroneous. It is not sufficient merely to call attention to alleged errors and recite that they are such. Ordinarily the court will consider as waived all assignments of error in support of which no reasons are stated, unless the error is so glaring or patent that no argument is needed to demonstrate it."

No reasons are given in support of the alleged errors designated as assignments one, two, five, six, seven and eight. All of the alleged errors, excepting three and four, should be considered as waived.

If the court should consider the unargued assignments, they are not well taken.

Assignment One (p. 4 Brief; p. 171 Trans.) is as follows:

> "The District Court erred in overruling the objection of the defendant to the question propounded to the witness, Iver N. Stensland, by the United States Attorney, as follows:
> 'Now what was the effect of this trap being in this position with reference to salmon approaching the stream?' "

The assignment is insufficient. It is too general, and does not comply with Rule 11 of this court. As stated in Walton v. Wild Goose Mining Company (C C A 9), 123 Fed. 209:

> "The Circuit Court of Appeals have repeatedly called the attention of counsel to the absolute necessity of adhering to the terms of Rule 11 * * * * concerning assignments of errors. * * * * The object of the rules is to so present the matter raised by the assignment of error that this court may understand what the question is it is called upon to decide without going beyond the assignment itself, and also that the party excepting may be confined to the objections taken at the time, which must then have been stated specifically. The party complaining of the action of the lower court must lay his finger upon the point of objection and must stand or fall upon the case he made in the court below. Appellate courts are not the proper forum to discuss new points. They are simply courts of review to determine whether the rulings of the court below, as presented, were correct or not."

Ulmer v. U. S. (C C A 6, 1915) 219 Fed. 647;

U. S. v. Percansky (D. C. Minn. 1923) 298 Fed. 995.

Examination of the transcript (pp. 92-93) shows that the court properly overruled the objection. One of the material facts in Case 1778-B was whether this fish trap prevented or impeded the ascent of salmon to the spawning grounds in Lucky Cove Creek (Information p. 5 Trans.) The question. "What was the effect of this trap being in this po-

sition with reference to salmon approaching the stream?" was material and relevant; and the answer (p. 92-93 Trans.) certainly tended to prove this essential fact. No objection was made to the answer, and the court was not asked to strike it out. Practically the same question was again asked the witness (p. 93 Trans.) and no objection was made to the question or to the answer.

Furthermore, the objection was not raised in the motion for a new trial (p. 150 Trans.), and it is fundamental that alleged errors and previous exceptions not incorporated in the motion for new trial are considered as waived.

17 C. J. 86, 87, Section 3349.

17 C. J. 89, Section 3350.

Balboa v. U. S. (C C A 9) 287 Fed. 125.

Assignment Two is as follows:

> "The District Court erred in sustaining the objection to the question propounded by defendant's counsel to the witness Iver Thue, as follows:
>
> 'Did you see at any of those times any seine fishermen fishing between the trap and the mouth of the creek.' "

This unargued assignment is not well taken. Examination of the Transcript (p. 103) discloses the fact that the witness was allowed to and did answer the question before objection was made by the government. The answer was, "Yes, sir," and it was not stricken out; consequently the defendant could

not have been prejudiced by the court's ruling in sustaining the government's objection to defendant's question. In view of the amendment of Section 269 of the Judicial Code (Comp. Stat. Ann. Supp. 1919, Section 1246) there was no prejudice to the substantial rights of plaintiff in error, and the pretended error should be disregarded.

Dye v. U. S. 262 Fed. 8 (C C A 4, 1919).

Dupree v. U. S. 2 Fed (2d) 44 (C C A 9, 1924).

Atwell (3d Ed.) Fed. Crim. Law & Proc. p. 122.

Assignments 3 and 4, being the assignments argued in plaintiff in error's brief, were answered in the first part of this brief.

Assignment 5 (p. 6 brief, p. 173 Trans.) is as follows:

> "The District Court erred in giving Instruction No. XII, which read as follows:
>
> 'Now, as to the question of notice to the defendant, that is not a material question in this case. Each offense in this case is what in law is called a malum prohibitum. The question of the good faith of the defendant does not arise in this case at all. The law provides that the defendant shall do certain things and the defendant is supposed to have notice of what the law provides. He is presumed to know the law, and where an act is prohibited which is not in itself immoral or wrong, it is termed a malum prohibitum and the defendant must do as the law requires him to do, whether his intention was to violate the law or not.' "

This assignment is not well taken. It is not argued

in the brief, and no specific objection was made, when the exception was taken (p. 146 Trans.); or in the assignment of errors (p. 173 Trans.); or in the brief (p. 6 Brief). Counsel's pretended objection to the instruction (p. 146 Trans.) is as follows:

> "The defendant excepts * * * to the instruction that no notice was required to be given the defendant and that the good faith of the defendant does not arise at all."

It is apparent that no objection was offered to the instruction at all. The rule in such cases is stated in 17 C. J. 64, Section 3333, as follows:

> "The general rule is that objections to instructions not made at the trial court cannot first be raised on appeal."

And in 17 C. J. 68, Section 3335, the authors say:

> "Usually a general objection to the ruling of the court will not be reviewed, but the objection must point out specifically the particular grounds upon which error is alleged to have occurred. Thus a general objection to an instruction given in a criminal case will not be considered on appeal, especially where some of the instructions are correct."

And in 17 C. J. 184, Section 3485, the authors say:

> "To obtain consideration in the reviewing court assignments of error in respect of instructions given or refused must specifically point out the errors relief on. Ordinarily, on noncompliance with the rule, a court will refuse to consider the assignments."

Furthermore, the instruction correctly states the law of the case. Circuit Judge Gilbert, in Thlinget

Packing Company vs. United States (C C A 9, 1916) 236 Fed. 113, said as follows:

> "Where the offense is malum prohibitum, the doing of the inhibited act constitutes the crime. The only fact to be determined by the jury is whether the accused did the act. No evil intent is essential to constitute the offense. A simple purpose to do the forbidden act is sufficient."

Farnham, Vol. 2 on Waters and Water Rights, p. 1415, Sec. 392, says:

> "Violations of fish and game laws belong to the class of actions of which intent is not necessary to constitute a part of the offense. The doing of a certain act is forbidden by the statute, and it is enough that one has committed such acts to render him subject to the penalty, although he did not know that he was violating the law and had no intention of doing so."

State v. Cherry Point Fish Co. 72 Wash 420; 130 Pac. 501;
16 C. J. 76, Section 42.

Assignment Six (p. 6 Brief; p. 173 Trans.) is directed to the court's failure to give defendant's proposed instruction No. 2. The proposed instruction, after quoting Section 3 of the Act of June 6, 1924, commonly known as the White Bill, is as follows:

> "You are instructed that in this case, unless it has been shown that the Secretary of Commerce, or some one under his direction, determined and marked the point designated as the mouth of the stream in question, you must find the defendant not guilty."

This assignment is not well taken. It is not argued

in the brief. The instruction is erroneous on its face, for, even though Section 3 requires the mouth of a stream to be marked, there is no such requirement under Section 4. The defendant was prosecuted under Section 3 (Case No. 1778-B) for unlawfully erecting and maintaining a fish trap on July 25, 1924, within 500 yards of the mouth of Lucky Cove Creek with the purpose and result of capturing salmon and preventing and impeding their ascent to the spawning grounds; and under Section 4 (Case No. 1749-B) (the two cases were consolidated for trial) for unlawfully fishing for and taking salmon for commercial purposes, from July 26, 1924, to August 20, 1924, within 500 yards of the mouth of a stream into which salmon run, to-wit, Lucky Cove Creek. Section 3 contains a provision that "For the purposes of **this section,** the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination."

Section 4 is silent as to any designation of the mouth of a stream by markers. Even though the proposed instruction was a correct statement of the law as to Case 1778-B under Section 3, it was not a a correct statement as to Case 1749-B under Section 4. Therefore, the proposed instruction, if given, would necessarily have resulted in a verdict of not guilty in Case 1778-B under Section 3, and also in

Case 1749-B, under Section 4, for in neither case was the mouth of the stream marked by the Secretary of Commerce.

If the proposed instruction correctly stated the law as to Case 1778-B under Section 3, it should have been limited to such case and section. It did not apply to Case 1749-B under Section 4. For this reason alone the lower court correctly refused the instruction.

The rule in such cases is set out in 16 C. J. (Criminal Law) 1036, Section 2477:

> "An instruction, whether given by the court of its own motion or requested, is erroneous and should not be given where it is calculated to confuse or to mislead the jury, as where it requires explanation or qualification."

And in 16 C. J. (Criminal Law) p. 1066, Section 2507:

> "Where a requested instruction is erroneous either wholly or in part it properly may be refused, as where it embodies both a correct and and incorrect proposition of law."

The court correctly instructed the jury, as to the mouth of the stream and as to the markers, in instructions seven and eight (pp. 140-141 Trans.) as we have heretofore pointed out in answering assignments 3 and 4.

Assignment Seven (p. 8 Brief; p. 175 Trans.) is directed to the court's failure to give defendant's proposed instruction No. 3, which proposed instruction is in the following words:

> "You are instructed that in order to find the defendant guilty, it is necessary for the government to prove that the stream in question was a stream or creek into which salmon ran prior to August 20, 1924; and if the government has not proved that salmon ran into this stream, or in other words, that this was a creek into which salmon ran between the 3rd day of July and the 20th day of August, 1924, your verdict must be not guilty."

The assignment is not well taken. It is not argued in the brief. The proposed instruction is erroneous on its face, for neither Section 3 nor Section 4 qualifies by periods or seasons the streams protected.

The violation charged in Case 1778-B, under Section 3, is of July 25, 1924. The violation charged in Case 1749-B, under Section 4, is on July 26, 1924, and continuously to and including August 20, 1924. The jury by their verdict found that the defendant did obstruct the stream and did illegally fish on the dates charged.

The evidence clearly shows (p. 59-93,102 Trans.) that Lucky Cove Creek was a stream into which salmon ran. The court's instruction 5 (p. 140 Trans.) correctly stated the law of the case as follows:

> "A stream into which salmon run, according to the statute as I interpret it, is a stream into which salmon are accustomed to run not at any particular time, but one into which salmon run at one interval or at another interval."

The court by instruction 5 also directed the jury to find as a fact whether Lucky Cove Creek was a

creek into which salmon run.

The defendant, by the proposed instruction, no doubt had in mind the idea that the jury could not find as a fact that salmon ran into Lucky Cove Creek between July 3 and August 20, 1924, the period during which the fish trap was installed there. He must have been seeking to take advantage of the following testimony given by Warden Stensland (pp. 92-93 Trans.):

> "I was in Lucky Cove on those occasions (July 23, 24, 31, August 6, 7, September 11, 12, 14 and 15, 1924) examining the trap and the stream. I saw fish schooling around the bay, or in the cove, in front of the trap, or in front of the mouth of the creek, and on the same occasions I didn't see any fish going up the stream because the trap was catching the fish that **was** acclimatizing themselves around the mouth of the stream. They were coming from the salt water and naturally they couldn't stand the sudden change from salt water to fresh water * * * This trap was so close to it (Lucky Cove Creek) that they were getting caught, and that's the reason there **was** no fish in the mouth of the stream, and I didn't expect to find any while the trap was there because that's the way it was last year."

In answer to the question: "What was the effect after this trap was removed and you went to the trap on September 11th, 12th, 14th and 15th?", the same witness testified (p. 93 Trans.) that he found salmon in Lucky Cove Creek. There was other abundant evidence that salmon ran into Lucky Cove

Creek at different intervals during the year. (Trans. 59, 93, 102.)

Clearly, the proposed instruction which would have required the government to prove that salmon ran into Lucky Cove Creek between July 3 and August 20, 1924, when the trap was capturing all the salmon which would have gone into the Creek, before the jury could find that Lucky Cove Creek was a creek into which salmon run, was not only unreasonable in fact but is also unreasonable in law.

Assignment Eight (p. 8 Brief; p. 175 Trans.) is as follows:

> "The court erred in overruling the defendant's motion for a new trial."

The order overruling the motion for a new trial is set out in full on page 166 of the transcript. It appears therefrom that the motion was argued before the court by counsel for the defendant; and that the court fairly heard, and fully understood and considered, the motion and the reasons advanced in support of it. It clearly appears that the court exercised its discretion in the matter. In the exercise of the discretion, vested in the court by law, the motion was overruled because the court did not believe the defendant was entitled to a new trial. No abuse of the court's discretion is urged by the defendant.

It is elementary that a motion for a new trial is addressed to the sound discretion of the trial court.

The overruling of such a motion is not reviewable, except for an abuse of discretion.

Smith v. U. S. 231 Fed 32 (C C A 9)
Leuders v. U. S. 210 Fed. 419 (C C A 9)
Kettenback v. U. S. 202 Fed. 377 (C C A 9)
Hedderly v. U. S. 193 Fed. 561 (C C A 9)
Dwyer v. U. S. 170 Fed. 165 (C C A 9)
McDonnel v. U. S. 133 Fed. 293 (C C A 9)

It appears to us, therefore, that not one of the six unargued assignments of error is well taken.

Before concluding our brief, we are of the opinion that a few points made by plaintiff in error, although irrelevant, ought to be briefly answered.

It is rather fallaciously argued(p. 24 plaintiff's brief) that the Bureau agents, in 1923, determined, but did not mark, a point at high tide line as the mouth of Lucky Cove Creek; and in 1924 they changed the mouth of the creek to a point at low tide, but they did not mark the point; yet it is also argued that the mouth of a creek cannot be fixed unless it is determined **and marked.** We are of the opinion that no further discussion is necessary to explain the fallacy of the contention that the mouth of Lucky Cove Creek was determined at high tide line in 1923, and changed to a point at low tide in 1924 without notice to plaintiff in error.

The fact that Bureau officers took some measurements in 1923, and did not immediately thereafter

prosecute the Company does not raise any inference that the officers determined the mouth of the stream to be at high tide line and the trap not within the prohibited distance, as argued by plaintiff in error.

The fact that this company violated the law at Lucky Cove for eight years before they were apprehended and prosecuted is no circumstance in their favor, as counsel would seem to contend. And, because the violations were not prosecuted until 1924, does not support the theory that the trap was maintained at Lucky Cove with the sanction of the officials of the Department of Commerce for eight years.

We believe that the foregoing points made by plaintiff in error are of no assistance to this court in determining whether the lower court erred.

CONCLUSION

We submit, therefore: that the lower court correctly instructed the jury, in Instruction seven, that the mouth of a stream is the point or place where the fresh waters of the stream meet tide water at mean low tide, and, therefore, the points set up in assignment No. 3 are not well taken; that the lower court correctly instructed the jury, in Instruction eleven, that it was not material that the mouth of Lucky Cove Creek had not been determined and marked by the Secretary of Commerce, and

therefore, the points set up assignment No. 4 are not well taken; that because assignments one, two, five, six, seven, and eight are not argued, they are waived and should not be considered; that, if the court should consider them, not one of such assignments is well taken.

Wherefore, the case made in the lower court ought to be affirmed.

Respectfully submitted,

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